138-291

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1361.

THE KANSAS CITY, FORT SCOTT AND MEMPHIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

R. S. DAUGHTRY, ADMINISTRATOR OF JOHN W. DAUGHTRY, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED OCTOBER 9, 1890.

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a The Supreme Court of the United States.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILROAD COMPANY, Plaintiff in Error,
vs.
R. S. DAUGHTRY, as Administrator of the Estate of John W. Daughtry, Deceased, Defendant in Error.

It is agreed between counsel for the parties that the clerk may print the following portions of the record filed in this case, to wit:

1. Summons.
2. The indorsements thereon.
3. The declaration.
4. The pleas filed by the Kansas City, Memphis & Birmingham Railroad Company.
5. The petition and bond to remove the case from the circuit court of Shelby county to the United States court, with the indorsements thereon.
6. Affidavit of R. S. Daughtry, with indorsements thereon.
7. The order entered by the circuit court of Shelby Co. denying the prayer of the petition to remove the cause.
9. The entry on the minutes of the circuit court of Shelby county empanelling the jury, and the respite at the conclusion of the first day's trial.
10. The order dismissing the case as to the Kansas City, Memphis & Birmingham Railroad Company.

b 11. The judgment against the Kansas City, Fort Scott & Memphis Railroad Company.

12. The testimony of R. S. Daughtry, as contained in the bill of exceptions.
13. The assignments of error in the supreme court of Tennessee, omitting "statement of the case," thereto attached.
14. The judgment of the supreme court of Tennessee.
15. The opinion of that court in this case.
16. The opinion of that court in the cause entitled C., O. & S. W. R. R. Company *vs.* Hendricks, administrator.
17. Writ of error.
18. Supersedeas bond.
19. Certificate of the clerk of the supreme court of Tennessee.
20. Assignment of error in this court.

WALLACE PRATT,
Att'y for Pl'ff in Error.
GEO. GANTT,
Atto. for Def't in Error.

[Endorsed:] Sup. Court U. S. Oct. term, 1890. No. 1361. K. C., F. S. & M. R. R. Co. *vs.* R. S. Daughtry, adm'r. Agreement as to printing record. Filed Oct. 9, 1890.

* * * * * * *

1 & 2 *Summons.*

State of Tennessee to the sheriff of Shelby county, Greeting:

You are commanded to summons The Kansas City, Fort Scott and Memphis Railroad Company and The Kansas City, Memphis and Birmingham Railroad Company, both of which are rail-
3 road corporations conducting business in Shelby county, Tennessee, with offices and agencies in said county and State, if to be found in your county, personally to be and appear before the judge of the circuit court of Shelby county, at a term of said court to be held for said county, at the court-house, in the city of Memphis, on the third Monday of September next, then and there to answer R. S. Daughtry, administrator of John W. Daughtry, dec'd, in an action to his damages thirty thousand dollars.

Herein fail not, and have you then and there this writ.

Witness Daniel Schloss, clerk of said court, at office, the third Monday in May, 1888.

DANIEL SCHLOSS, *Clk.*
GEO. J. CAMPBELL, *D. C.*

Endorsements.

Issued 16th day of Aug., 1888. Geo. J. Campbell, D. C.

4 Came to hand 16th day of August, 1888. Executed on The Kansas City, Fort Scott and Memphis Railroad Company by reading the contents of this writ to J. H. Sullivan, sup't of said railroad Co., he being the highest officer to be found in my county, and executed on The Kansas City, Birmingham and Memphis Railroad Company by reading the contents of this writ to J. H. Sullivan, sup't, he being the highest officer of said Co. to be found in my county.

This 23rd day of August, 1888.

W. D. CANNON, *Sh'ff,*
By E. E. COLBY, *D. S.*

Declaration.

In the Circuit Court of Shelby County. September Term, '88.

R. S. DAUGHTRY, Ad'r of Jno. W. Daughtry, Dec.,
vs.
5 THE KANSAS CITY, FORT SCOTT AND MEMPHIS R. R. Co. and THE KANSAS CITY, MEMPHIS & BIRMINGHAM R. R. Co.

1st count.

Plaintiff, as administrator of Jno. W. Daughtry, sues the defendants, who are corporate persons, doing business as such in Tennessee (under license and by consent of the State), for the sum of $30,000.00, and demands a jury.

Plaintiff makes profert of his letters of administration, the same being here to the court shown. Plaintiff avers that the defendants are and were on and prior to the 16th of August, 1888, engaged in operating important lines of railway under one common or general managements, with depots and terminal facilities in the taxing district of Shelby county; that among other privileges enjoyed by defendants was that of running cars and engines along and over the river front or public landing on the eastern bank
6 of the Mississippi river in front of the taxing district of Shelby county by means of one or more railway tracks laid thereon under license and contract with said taxing district; that said landing is very public and extensively used for business, trade, and commerce, necessitating almost constant passing over and across said railway tracks by persons in vehicles, on horseback, and on foot going to and returning from the levee or public landing wharf and up and down the river front.

That it was and is the duty of defendants to use the privilege of operating their cars and engines over said track or tracks with care and caution; to keep and maintain — all street crossings or points opposite the same flagmen to warn those using the levee of the approaching engines and trains, and to sound the whistle or
7 ring the bell of such engines, and to keep control of their engines and cars by means of competent and adequate number of employees, and not to run at a rate of speed exceeding six miles per hour.

Plaintiff shows and avers that said defendants were wholly unmindful of their duty and recklessly disregarded compliance therewith; that on or about the 12th day of August, 1888, the defendants pushed or hauled eight or nine freight cars belonging to them or under their control northward over one of said railway tracks until it had ascended up grade at the Beal-street railroad bridge and was beginning to descend on a decided down grade, the grade continuing to fall until a point to the north was reached at *as* nearly opposite the mouth of Jefferson street; that instead of holding said cars with the engine so as to control and regulate the speed of the same on said down grade, the defendants purposely, incour-
8 tiously, and with gross and wanton recklessness detached the engine from said cars and turned them loose, with only a single brakeman on the same, or at most only two, and inadequate to control said train under the circumstances, and they went plunging down said grade with accelerating speed until they were running at high speed, to wit, from 12 to 15 miles per hour; that they were without bell or whistle to give warning of their approach, and, practically, a wild train; that the flagman of defendants was either out of place or attending to other duties and failed to give the danger signal; that the plaintiff's intestate, being in good health and a sound and able-bodied man of about thirty years of age, was in the act of crossing the railroad tracks at a point not far
9 from the mouth of Union street, a usual place of crossing, being on lawful business, and wholly without warning of the descending and approaching danger by bell, whistle, flag, or other

signal, and with attention drawn to an engine moving in the opposite direction that as approaching him from the north and going south, and which engine gave warning of its approach by bell or whistle, and while in the act of making said crossing the said wild train of defendants dashed upon him with great force and tore and mangled him almost beyond recognition, causing his death under circumstances of great distress and in a horrible and shocking manner.

Plaintiff avers that said killing occurred about the 12th of Aug., 1888; that it was the result of gross and criminal disregard by defendant- of the law of the land, of the police regulations of the taxing district, of the contract between defendants and the
10 taxing district, and the license under which they were using said tracks, and was so wanton as to manifest utter disregard of the rights and safety of others using said river front and levee; that his intestate was cut off in full possession of all his powers, in the early prime of life, and in broad, open day, without the slightest warning by the said wrongful conduct of defendants in such manner as to make those witnessing shudder and cry out with horror at the reckless and bloody deed, to the damage of plaintiff $30,000.00, and therefore he sues, and demands a jury.

2nd count.

Plaintiff, as administrator aforesaid, sues the defendant corporations, doing business in Tennessee as aforesaid, for $30,000, and demands a jury. He makes profert of his letters of adminis-
11 tration. He avers that on or about the 12th day of August, 1888, def't companies were operating cars and engines on their railroad lines leading into the taxing district of Shelby county, and especially over a track along the public landing or wharf on the east bank of the Mississippi river owned by defendants or one of them, *on* which they had leave to use, the said track being over public grounds much frequented and used for purposes of trade and business by the people of said municipality and the public generally, and the said defendants did, on the day and year aforesaid, at and, etc., aforesaid, run and operate a loaded train of eight freight cars along and over said levee on its said tracks, and in so doing failed to keep the engineer, fireman, or other person upon the locomotive as a lookout ahead, but detached the locomotive from
12 said cars upon a down grade with only one or two brakemen at most upon said train, which descended said grade at a high speed, to wit, not less than 15 miles per hour, and thus operating said train purposely put it out of their power to sound the alarm whistle or ring the bell and employ every possible means to stop said train and prevent an accident when any person or animal or other obstruction might appear on said railroad track, and being then and there thus voluntarily disabled from discharging and performing its said statutory duties. Plaintiff'- intestate, in the lawful pursuit of his business, appeared upon said track to cross the same, but upon his appearance def't companies did not sound the alarm whistle or ring the bell or use every possible means to stop said

train, but, on the contrary, without warning and without
13 knowledge on the part of plaintiff's intestate said train was recklessly and incourtiously run over said intestate, and such injuries were wrongfully inflicted on him; that soon thereafter, to wit, before the institution of this suit, he died from injuries thus received.

Plaintiff further avers that his intestate was in the prime of life and in the full possession of all his powers, mentally and physically, when his life was thus recklessly and wantonly terminated by the said grievous and gross malconduct of def't companies.

And therefore plaintiff sues for $30,000, and demands a jury.

TURLEY & WRIGHT AND
GANTT & PATTERSON,
Att's for Pl'ff.

Endorsed: Filed Sept. 17th, 1888. Geo. J. Campbell, D. C.

14 *Pleas of Def'ts.*

Circuit Court, Shelby County, Tenn.

R. S. DAUGHTRY, Administrator, etc.,
vs.
K. C., F. S. & M. R. R. *et al.* } No. 5197, A. D.

Comes the Kansas City, Memphis and Birmingham Railroad Company and, for plea to the declaration, says:

1st. It is not guilty of the matters and things charged against it in the first count of the plaintiff's declaration in the manner and form therein alleged.

C. H. TRIMBLE,
Att'y for Def't.

2d. It is not guilty of the matters and things charged against it in and by the second count of the plaintiff's declaration in the manner and form therein alleged.

C. H. TRIMBLE,
Att'y for Def't.

15 Endorsed: Filed Sept. 25, '88. Achille Leopold, D. C.

Petition and Bond for Removal.

In the Circuit Court of Shelby County, Tennessee.

R. S. DAUGHTRY, Administrator, etc.,
vs.
THE KANSAS CITY, FORT SCOTT AND MEMPHIS R. R. Co. *et al.*

Petition for removal to the circuit court of United States.

Comes your petitioner, The Kansas City, Fort Scott and Memphis Railroad Company, and shows to the court—

That the matter or amount in dispute in the above-entitled cause

exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the controversy in said suit is between citizens of different States; that your petitioner, The Kansas City, Fort Scott and Memphis Railroad Company, was at the time when this suit was
16 commenced and still is a corporation created and existing under and by virtue of the laws of the States of Missouri, Arkansas, and Kansas and was and still is a citizen of said States.

That the plaintiff, R. S. Daughtry, administrator, was at the beginning of this suit and still is a citizen and resident of the State of Tennessee; that your petitioner, The Kansas City, Fort Scott and Memphis Railroad Company, is a defendant in the above-entitled cause, and that it was at the commencement of this suit and still is a non-resident of the State of Tennessee; that there is in this suit a controversy which is wholly between citizens of different States, viz., R. S. Daughtry, administrator, and your petitioner, which can be fully determined as between them without the presence of petitioner's codefendant, The Kansas City, Memphis and Birmingham
16½ Railroad Co. Your petitioner further shows that its said codefendant, The Kansas City, Memphis and Birmingham Railroad Company, is a corporation created and existing under and by virtue of the laws of the State of Tennessee, and that it is a citizen thereof.

That all acts alleged by the declaration in this case to have been done jointly by petitioner and its said codefendant, The Kansas City, Memphis and Birmingham Railroad Company, were, if done at all, done by petitioner alone; that its said codefendant did not at the time when the said acts are alleged to have been done, that it does not now, and never did own, possess, control, or use the said railroad track upon which said acts were done.

That it was not present when the said acts were done; that none of its agents, servants, or employees were present at the doing of said acts or at the doing of any of them; that none of its
17 agents, servants, or employees in any manner assisted in the doing of said acts or in the doing of any of *any of* them, and none of them in any manner participated therein.

That no officer, agent, servant, or employee of that company exercised any control or authority whatever over any person, locomotive, car, railroad track, or other thing who or which were present or participating in said acts or any of them; that it did not own or use any locomotive, cars, things, or means which were in any manner used or controlled by those who did the acts complained of.

That the said Kansas City, Memphis and Birmingham Railroad Company has been joined in this action as a nominal party defendant for the sole purpose of preventing your petitioner from removing this case to the circuit court of the United States.

Your petitioner offers herewith a bond, with good and
18 sufficient surety, for its entering in the circuit court of the United States for the western division of the western district of Tennessee, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said

circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Petitioner prays this court to proceed no further herein, save to accept said petition and bond and make the order of removal required by law.

KANSAS CITY, FORT SCOTT AND MEMPHIS RAILROAD COMPANY,
By EDWARD TRIMBLE,
J. W. BUCHANAN, *Attorneys.*

Bond.

Know all men by these presents that we, The Kansas City, Fort Scott and Memphis Railroad Company, as principal, and
19 *and* R. Galloway and C. H. Trimble, as sureties, are held and firmly bound unto R. S. Daughtry, administrator of the estate of John W. Daughtry, deceased, in the penal sum of five hundred dollars ($500.00); for the payment whereof, well and truly to be made unto the said R. S. Daughtry, administrator, his successors, heirs, and assigns, we bind ourselves, our successors, representatives, and assigns, firmly by these presents, yet upon these conditions: The said Kansas City, Fort Scott and Memphis Railroad Company having petitioned the circuit court of Shelby county, Tennessee, for the removal of a certain cause therein pending, wherein said R. S. Daughtry, as administrator of the estate of Jno. W. Daughtry, deceased, is plaintiff and the said Kansas City, Fort Scott and Memphis Railroad Company and The Kansas City, Memphis and Birming-
20 ham Railroad Company are defendants, to the circuit court of the United States for the western division of the western district of Tennessee: Now, if the said Kansas City, Fort Scott and Memphis Railroad Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 28 day of May, 1889.

R. GALLOWAY.
C. H. TRIMBLE.
KANSAS CITY, FORT SCOTT AND MEMPHIS RAILROAD COMPANY,
By C. H. TRIMBLE, *Attorney.*

21 Endorsed: Filed May 29th, '89. Dan'l Schloss, clerk.

Affidavit of R. S. Daughtry. Filed June 1st, '89. L. E. Boswell, D. C.

In the Shelby County Circuit Court.

R. S. DAUGHTRY, as Adm'r, *and* etc.,
vs.
KANSAS CITY, MEMPHIS AND B. R. R.

This day personally appeared before the undersigned, clerk of the circuit court of said county and State, R. S. Daughtry, who, after being duly sworn, states that he is the plaintiff in this cause; that he is a citizen of the State of Arkansas and has been a citizen of said State for the last ten years; that all beneficiaries in said suit are also citizens of the State of Arkansas and have been for the last ten years.

R. S. DAUGHTRY.

22 Subscribed and sworn to this 1st June, '89.

DAN'L SCHLOSS, *Clerk*,
By L. E. BOSWELL, *D. C.*

And on, to wit:

SATURDAY, *June 1st*, 1889.

May Term, 1889.

Petition to Remove Denied & Ordered to Plead.

R. S. DAUGHTRY
vs.
KANSAS CITY, FORT SCOTT AND MEMPHIS R. R. Co. *et al.* } 10318, T. D.

This day the defendant, The Kansas City, Fort Scott and Memphis Railroad Co., presented to the court its petition and bond to remove this case to the circuit court of the United States for the western division of the western district of Tennessee, which was filed herein on May 29th, 1889; and the court, having duly considered said petition, together with the affidavit of R. S. Daughtry filed herein June 1st, 1889, and heard argument of counsel, is of
23 the opinion that upon said petition and affidavit said defendant is not entitled to the order of removal prayed in its said petition, and its application in that behalf is denied and said defendant is allowed one day to plead to the merits; to all of which the said Kansas City, Fort Scott and Memphis Railroad Company, by its attorney, excepts and asks that its exceptions be noted of record, which is accordingly done.

* * * * * * *

24 And on, to wit:

THURSDAY, *June 6th*, 1889.

May Term, 1889.

Jury and Respite.

R. S. DAUGHTRY, Adm'r,
vs.
KANSAS CITY, FORT SCOTT AND MEMPHIS R. R. Co. } 10318, T. D.

Came the parties, by attorneys, and a jury of good and lawful men, to wit, J. E. Clarkson, Elias Porter, John Waynesborough, P. E. Hopkins, Edward Barinds, C. C. Hein, J. M. Goodlow, Chas.
25 Marabee, Jas. H. Scaife, R. E. Semmes, Wm. B. Gates, and John W. Dillard, who, being duly elected, tried, and sworn to well and truly try the issues joined in this case and true verdict render according to the law and evidence, and there not being sufficient time to-day to conclude the trial of this cause, the same is continued over till to-morrow.

An on, to wit:

FRIDAY, *June 7th*, 1889.

May Term, 1889.

Plaintiff Dismisses as to K. C., M. and B. R. R. Co.

R. S. DAUGHTRY, Adm'r,
vs.
KANSAS CITY, FORT SCOTT AND MEMPHIS R. R. Co. and KANSAS CITY, MEMPHIS AND BURMINGHAM R. R. Co. } 10318, T. D.

This cause is this day dismissed by plaintiff as against defendant Kansas City, Memphis and Birmingham Railroad Company.

26 And on, to wit:

FRIDAY, *June 7th*, 1889.

May Term, 1889.

Judgment.

R. S. DAUGHTRY, Adm'r of John W. Daughtry, Dec'd,
vs.
KANSAS CITY, FORT SCOTT AND MEMPHIS R. R. Co. } 10318, T. D.

Come the parties, by attorneys, and a jury of good and lawful men, to wit, J. E. Clarkson, John Waynesborough, Elias Porter, P. E. Hopkins, Edward Barinds, C. C. Hein, J. M. Goodlow, Chas. Marabee, Jas. H. Scaife, R. E. Semmes, Wm. B. Gates, and John W. Dillard, who were on yesterday elected, tried, and sworn well and truly to try the issues joined and a true verdict render according to the law and evidence, now on their oaths do say they find in

favor of the plaintiff, and assess his damages at eight thousand dollars ($8,000.00). It is therefore considered by the court
27-94 that plaintiff recover of the defendant said sum of eight thousand dollars, the amount of the verdict of the jury aforesaid, and also the costs herein, and that execution issue.

95 * * * * * * *

R. S. DAUGHTRY, plaintiff, being next duly sworn, testified
96 in his own behalf as follows, to wit:

Direct examination by Gen. L. E. WRIGHT:

Q. You are the plaintiff in this case?
A. Yes, sir.
Q. You are the administrator of John W. Daughtry, deceased?
A. Yes, sir.
Q. Have you a copy of your letters of administration?
A. I don't have them with me.

It is agreed between counsel that the same shall be filed in the cause during the proceeding.

Q. What was your brother's name?
A. John W. Daughtry.
Q. Where do you live, Mr. Daughtry?
A. In Lonoke county, Arkansas.
Q. What is your business?
A. I am a farmer.
Q. What was your brother's age?
97 A. He was 29 years old at the time he was killed.
Q. What was his health before he was killed?
A. Good health.
Q. What was his business?
A. He had been farming some, and then he was down here clerking some—doing first one thing and then another.
Q. Where had he been farming?
A. Over in Arkansas, for Pearson.
Q. What was he doing?
A. Superintendent of the farm.
Q. For Pearson—that was the old Apperson place, was it?
A. Yes, sir.
Q. He was superintendent of that place?
A. Yes, sir.
Q. At the time of his death what was he doing?
A. Clerking in the Rob Roy.
98 Q. What was your brother's habits as to sobriety?
A. He was a sober man.
Q. Do you know what wages he was getting at the time of his death?
A. I do not.
Q. Do you know what wages he had been getting?
A. No, sir; I never asked him.

Q. Was your brother married or unmarried?
A. Unmarried.
Q. Is your father living?

Objected to for want of allegation. Overruled. Defendant excepts.

A. Father is. Mother is dead.
Q. Where does your father live now?
A. In Lonoke county, Arkansas.
Q. Have you any brothers or sisters living?

Objected to for same reason. Overruled. Defendant excepts.

A. I have two sisters living.
99–198 Q. You are the only brother?
A. The only one living.

Cross-examination by C. H. TRIMBLE, Esq.:

Q. How old is your father?
A. About 60 years old. He may be a little over or he may be a little under. I don't know exactly.

Defendant objects to all testimony as to existence of brothers or sisters or father or family of deceased on the ground that there are no allegations in the declaration to warrant it. Overruled. Defendant excepts to ruling of court.

* * * * * * *

199 Filed April 1st, 1890.

JNO. W. BUFORD, *Clk*,
By ROB'T LINDSEY, *D. C.*

In the Supreme Court of Tennessee.

KANSAS CITY, FORT SCOTT & MEMPHIS RAILROAD COMPANY
vs.
R. S. DAUGHTRY, Adm. of Jno. W. Daughtry, Dec'd.

Assignment of Errors.

One to nine, inclusive. For the first nine assignments of error appellant says that it was error for the court to refuse to give each of the nine special charges requested by it, as shown at pages 5, 6, and 7 of statement annexed, and appellant assigns as a separate error the failure of the court to give each of said charges.

10.

For the tenth assignment of error appellant says that the court should have set the verdict aside as contrary to the law and evidence, because deceased was instantly killed, and there was no proof of any expectation of pecuniary benefit to result to next of kin by continuance of life of deceased.

11.

It was error to allow the jury to assess exemplary damages at all, because the law of Tennessee does not permit the recovery of exemplary damages in suits by administrators for injuries resulting in death.

12.

The court erred in charging the jury as follows:

"If you find from the evidence that defendant, at the time when it is claimed J. W. Daughtry was killed, had stopped a train of cars on a heavy grade, and the engine, being detached from the train, had moved off and left the train and had been switched off on another track, and the brakes of the train were then unloosed and the train set in motion with an insufficient force of men upon it to control it, and the train ran rapidly upon the track over streets continuously used for public travel, and if you find farther that there were no precautionary measures taken by the railroad, such as gates or flagmen, to warn or prevent persons from crossing the track when trains are approaching the crossing, this would amount to gross negligence and such as would authorize you to give, in addition to compensatory damages, what the law terms punitive damages. In such cases the interest of the injured and that of the public are blended, and you are authorized to give such additional damages as will be a warning to others and deter them and others from the commission of a like offense."

This charge was erroneous because it was the province of the jury to determine, under proper instructions, whether the acts enumerated amounted to gross negligence and no, the province of the court.

It was also erroneous because it excluded from the consideration of the jury all evidence favorable to the defendant which might explain the acts enumerated.

200–206

13.

It was error to admit evidence of the expectancy of the life of deceased.

14.

The court erred in admitting testimony tending to show that defendant had at other times, by its employees, committed acts similar to the one resulting in death of deceased.

15.

The court erred in the charge as given in telling the jury that it was the duty of defendant to have gates at crossings. There is no allegation in the declaration to warrant this.

16.

The court erred in telling the jury that the statutes of Tennessee expressly forbid trains being run at a higher rate of speed than six miles an hour. There is no such statute in Tennessee.

17.

It was error to refuse to order the case removed to the circuit court of the United States.

C. H. TRIMBLE,
Att'y for Appellant.

* * * * * * *

207 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State for the western division thereof at the April term, A. D. 1890.

Present: The Hon. Peter Turney, chief justice, and D. L. Snodgrass, H. H. Lurton, W. C. Caldwell, and W. C. Folks, associate judges, when the following proceedings were had, to wit:

THURSDAY, *May 1st*, 1890.

K. C., F. S. AND M. R. R. Co.
vs.
R. S. DAUGHTRY, Adm'r. } # 3, Shelby Law Docket.

This cause was heard upon the transcript of the record from the circuit court of Shelby county; and it appearing to the court that in the judgment of the court below there is no error, it is therefore considered by this court that said judgment of the court
208 below be in all things affirmed, and that R. S. Daugtry, administrator of John W. Daughtry, dec'd, recover of the plaintiff in error, The Kansas City, Fort Scott and Memphis R. R. Co., the sum of eight thousand dollars ($8,000.00), amount of the judgment of the court below, together with the State and county tax on this litigation and the costs of the court below, and of said railroad and W. P. Dunnavant and Sam. Tate, Jr., surety on appeal bond, the further sum of four hundred and thirty-two dollars ($432.00), interest on above judgment from its rendition in the court below to this time, together with the costs of the appeal, for which let execution issue.

209 *Opinion.*

KANSAS CITY, FORT SCOTT AND MEMPHIS RAILROAD Co.
vs.
R. S. DAUGHTRY, Adm'r.

The first nine assignment- of error are based on the failure of the court to give in charge requests made before the court had charged the jury. Under our rule there was no error in the refusal.

It was not error to allow the jury to assess exemplary damages.

This question was directly raised and decided in Haley *vs.* M. and O. R. R'd Co., 7 Baxter, 242. In that case the circuit judge instructed the jury that "if plaintiff's intestate was killed by defend-

ants and died instantly no vindictive or exemplary damages
210 could be recovered." Ch. J. Deaderick, after a full review of the cases of this and other States, concludes: "We are of opinion that the charge of the court complained of was erroneous as given, and if the elements of fraud, malice, gross negligence, or oppression existed in the case, whether death was instantaneous or not, exemplary damages might be recovered." This ruling has been followed for 16 years, and we see no reason to disturb it. It is sound and just.

We have passed upon the question of removal to the Federal court in a case just disposed of with very similar facts—C., O. and S. W. R. R. Co. *v.* Hendricks, adm'r.

The other matters assigned do not contain reversal error.

Affirm-.

TURNEY, *Ch. J.*

211 *Opinion.*

C. & O. & S. W. R. R. Co. & N. N. & M. V. R. R. Co.
v.
M. R. HENDRICKS, Adm'r.

The action is to recover damages for the killing of J. C. Hendricks on Dec. 12, 1887.

The first assignment of error is upon the refusal of the circuit to transfer the cause to the U. S. circuit court.

The grounds of the petition are that petitioner at and before the commencement of suit was and is now a citizen of Connecticut, and that Hendricks, adm., was and still is a citizen of Tennessee.

That the controversy is whol-y between the petitioner, New-
211*a* port News & Mississippi Valley Company, and the plaintiff, citizens of different States; that the Chesapeake, Ohio and Southwestern R. R. Co. is neither a necessary or proper party to this suit.

That plaintiff has joined said railroad Co. as a defendant simply for the purpose of endeavoring to defeat petitioner's right of removal.

That the cause of plaintiff is a fraudulent, unjust, and illegal attempt to deprive said U. S. court of its lawful jurisdiction as well as a fraud on petitioner's right, &c.; that in 1888 plaintiff com-
212 menced his suit against the defendants for the same matters and things set forth and complained of; that after beginning suit plaintiff dismissed his said action against C. & O. and S. W. R. R. Co. and proceeded alone against petitioner.

Thereafter, on one of the days of March term, 1888, petitioner filed a petition for the removal of the cause to the circuit court of the United States. The circuit court of the State granted the prayer, &c.

Afterwards plaintiff dismissed that suit, having theretofore begun the present one against the two companies, joining the latter fraudulently and for the single purpose of divesting the Federal
213 court of its jurisdiction and depriving petitioner of its right, &c., he having no claim whatever against C. & O. and S. W.

R. R. Co.; that by his dismissal of his former suit the plaintiff admitted and confessed that he had no cause of action against the party, and that his sole cause of action was against the petitioner alone.

The petition was answered with a definite denial of all fraud, of any admission or confession that the petitioner was alone liable, and insisting that both corporations were jointly and severally liable; that prayer of the petition was refused. It is here insisted
214 "the sole question upon the petition for the State court to determine was wheather upon the face of the petition a good cause for removal was made. If so, then the removal was matter of right and of cause, subject, however, only to enquiry in the Federal court as to the truth of the allegations of the petition."

To support this position reference is had to several cases from the U. S. Supreme Court. The latest utterance to which *we* our attention has been called is in the case of L. & N. R. R. Co. *vs.* Wangelin, 132 U. S. Reports, in which Justice Gray says: "It is equally
215 well settled that in any case the question wheather there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the State court at the time of the filing of the petition for removal, independently of the allegations in the petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the Federal court." While in the case before us there is an allegation of fraud, which is denied, there was no proof
216 offered to sustain it. The condition of the record in the State court at the time of filing the petition was not such as to warrant a removal. Trying the question by the face of the record the jurisdiction of the State court was exclusive. That condition is sought to be changed by the unsworn petition of the defendant below, *who* was for a removal upon extraneous allegations without proof.

In Stone *vs.* Carolina, 117 U. S. R., 432, Ch. Justice Waite says: "A State court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on
217 its face shows that the petitioner has a right to the transfer." * * * "The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this the suit must be one that can be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record and the necessary security having been given, the power of the State court in the case ends and that of the circuit court begins."

In this case no application was made to the Federal court,
218 and of course that court could not settle the question. The Federal question of removal was presented to the State court, and before that court could be authorized to order the removal it was its duty to ascertain and determine that "a case has been made which on its face shows that the petitioner has a right to the transfer" and "was not bound to surrender its jurisdiction" before.

We are unable to agree with the counsel for the petitioner that the language of the Supreme Court in construing the statutes of removal meanes that a petition like the presant without more
219 ousts the State court of its jurisdiction and transfers it to the Federal court.

This may be so when the petition and bond are filed in the latter court and the duty of investigation imposed upon it. Such is clearly, we think, the true meaning of the cases. The right to petition attaches to either court at the election of the petitioner, but when he has made his election he must submit to that election for all the purposes and provisions of the statutes under which he is proceeding, and when either has passed upon the questions he is
220 bound by the ruling except he may appeal from the final judgment of the State court when perhaps he cannot from that of the Federal court.

When the Supreme Court says the petitioner must make a case for removal it means he must make it under the statute and to the satisfaction of the court to which he makes the application, and not that he can by piecemeal try the question in the two courts. If the contention is sound we will have the anomaly of a cause removed from the State court and suspended until the Federal court
221 can pass *pass* upon the merits of the application, the parties in the meantime not knowing where the cause pends, and neither court knowing which has jurisdiction.

Since this opinion was filed it has been suggested that under the act of Congress of 1887 the application for removal can be made only in the State court. If this were so it affords a stronger reason that that court must pass upon the sufficiency of the grounds laid for removal.

A case must be made for removal and made to the court asking to remove under the rule insisted upon. Every case involving
222 the jurisdictional amount could be removed or its trial retarded until after action of a Federal court. Uander the rule in this State there is nothing in the allegation that the dismissal of the former suit as to one of the parties was an admission that there was no cause of action against that party as *tasl feasers* and jointly and severally liable.

The second assignment is the verdict and judgement for fifteen thousand dollars, — is excessive. Deceased was postmaster and express agent at Trimble, on the C., O. & S. W. R. R. He was
223 struck by an engine and train of one car and a freight caboose running on the schedule of the regular passenger train which carried the mail and express matter. The engine and train which did the killing was running ahead of the passenger train at a speed of thirty to forty miles per hour. The postmaster and express agent, passengers, and all persons having business with trains had to cross the track in front of trains—a most dangerous & careless arrangement; one that must not be overlooked.

There were standing cars, lumber, and other things
224 calculated to obstruct the view. The train made no check of speed, and the deceased in attempting to cross was struck

by the engine, knocked 49 feet against a bank, & rebounded to the cross-ties; he lived about 45 minutes. Several other persons barely escaped a similar fate. It was supposed to be the regular train and that it would slow to about 4 miles per hour. No notice had been given of its approach except the signal whistle. It should have slowed down or stopt at the telegraph office for orders; that it was being run at a very high and dangerous speed with proper
225 and continuous signals is conceded, and was running on the time of the regular passenger train, which always slowed down in approaching and stopt at said station, a village of about three hundred inhabitants.

Deceased was a careful, prudent man and not careless about crossing tracks in front of trains; was about 33 years of age.

The facts do not make out a case for removal for excessive damages. The conduct of the engineer, who is shown to — a fast runner & had that day passed Dyersburg at the speed of sixty miles per hour, was careless in the extreme. The throwing of the
226 body 46 feet, with a rebound, leaves no room to doubt the recklessness of the engineer and his utter disregard of human life.

The several requests to charge were made before any charge was given. None of them were repeated afterwards. Under the rule in this State it was not error to refuse to give them (Roller *vs.* Bachman, 5 Lea, 159; Railroad *vs.* Foster, 4 Pickle). Counsel *showed* first hear the charge and then make such requests as in their opinion are right & proper in extension or modification. The
227 court makes up his charge in the progress of the case in proof and argument, and is usually prepared to deliver it at the conclusion of the argument. It would be the imposition of great labor to require him to lay aside his own charge and study one or more prepared by counsel of the respective sides and remodel his to conform to many requests, as in this case. Such a practice would result in much confusion and a multiplication of error as well as delay in the trial of cases.

In this case a practice was adopted which we recommend
228 to the profession, and one we would be glad to see adopted by it.

The bill of exceptions does not set out the testimony of each witness on either side, but simply states that the proof for each tended to show certain facts. It is well done, of easy comprehension, and presents what would otherwise have been a cumbersome record in a small compass and yet fully, pertinently, and distinctly raises every question of law and fact.

On his motion for new trial the able counsel presented all
229 his grounds in writing, thereby giving to the court every opportunity to detect any error he may have committed. On the trial here only these grounds were formerally and fully drawn out — make up the assignments of error.

We see no reason at present why circuit courts should not require counsel to point out in this way the grounds on which they base such motions and treat as waived such as are not thus designated.

There is no reasonable error in the charge as given, and the judgement is affirmed.

TURNEY, *Ch. J.*

Filed May 1st, 1890.

JOHN W. BUFORD, *Clerk*,
By ROBERT LINDSEY, *D. C.*

230 Know all men by these presents that we, The Kansas City, Fort Scott and Memphis Railroad Company, a corporation created and existing by and under the laws of the States of Missouri, Kansas, and Arkansas, as principal, and George H. Nettleton and Sam. Tate, Jr., and C. N. Schutte, as sureties, are held and firmly bound unto R. S. Daughtry, as administrator of the estate of John W. Daughtry, deceased, in the full and just sum of eighteen thousand dollars ($18,000), to be paid to the said R. S. Daughtry, as administrator of the estate of John W. Daughtry, deceased, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

231 Sealed with our seals and dated this 15th day of May, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of the supreme court of the State of Tennessee, in a suit depending in said court between R. S. Daughtry, as administrator of the estate of John W. Daughtry, deceased, and the said Kansas City, Fort Scott and Memphis Railroad Company, judgment was rendered against the said Kansas City, Fort Scott and Memphis Railroad Company, and the said Kansas City, Fort Scott and Memphis Railroad Company having obtained a writ of error to the supreme court of the State of Tennessee and filed a copy thereof in the clerk's office of the said court to reverse the judgment obtained by the said R. S. Daughtry, as administrator, etc., in

232 the aforesaid suit, and a citation directed to the said R. S. Daughtry, as administrator of the estate of John W. Daughtry, deceased, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Kansas City, Fort Scott and Memphis Railroad Company shall prosecute this writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

KANSAS CITY, FORT SCOTT AND MEMPHIS RAILROAD COMPANY,
By GEORGE H. NETTLETON, *President.*
GEORGE H. NETTLETON. [SEAL.]
SAM. TATE, JR. [SEAL.]
C. W. SCHUTTE. [SEAL.]

Signed, sealed, and delivered in presence of—
C. H. TRIMBLE.

Approved by— P. TURNEY,
Chief Justice Supreme Court, Tennessee.

May 15th, 1890.

233 [Endorsed:] Bond. Supersedeas bond. Filed May 15th, 1890. John W. Buford, clerk.

234 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between R. S. Daughtry, as administrator of the estate of John W. Daughtry, deceased, and The Kansas City, Fort Scott and Memphis Railroad Company, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, *and* manifest error hath happened, to the great damage of the said Kansas City, Fort Scott and Memphis Railroad Company, as by this complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,
235 that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday in October next, in the Supreme Court, in said city, to be then and there held, that, the record and proceedings being inspected, *that* the Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, and the seal of the circuit court of the United States for western district of Tennessee, the 14th day of May, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] JOHN B. CLOUGH,
Clerk of the Circuit Court of the United States for the Eastern Division of the Western District of Tennessee.

Allowed by—

P. TURNEY,
Chief Justice of the Supreme Court of Tennessee.

May 15, 1890.

STATE OF TENNESSEE:

I, Jno. W. Buford, clerk of the supreme court of Tennessee for the western division thereof, hereby certify that the Kansas City, Fort Scott and Memphis Railroad Company lodged the foregoing writ of error, together with a copy thereof for the adverse party, in my office, at Jackson, Tennessee, on the 15th day of May, 1890.

Witness my hand and the seal of said court, affixed at Jackson, Tennessee, this July 30th, 1890.

[Seal Supreme Court of Tennessee, Western Division, Jackson, Tenn.]

JNO. W. BUFORD *Clk.*

236 [Endorsed:] Writ. Kansas City, Ft. Scott & Memphis R. R. Co. *vs.* R. S. Daughtry, administrator, &c. Writ of error to supreme court of Tennessee.

237 THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of the said State for the western division thereof, at Jackson, do certify that the foregoing pages contain a true, perfect, and complete copy of the transcript of the record from the circuit court of Shelby county filed in said supreme court, of the judgment rendered by said court thereon, of the assignments of error filed in said court with said transcript by plaintiff in error, and the opinion of said court filed in the cause pending therein, entitled The Kansas City, Fort Scott — Memphis Railroad Company, plaintiff in error, against R. S. Daughtry, administrator of the estate of John W. Daughtry, deceased, together with the supersedeas bond, filed May 15th, 1890, and the opinion of the said supreme court filed in the cause entitled The Chesapeake, Ohio & Southwestern Railroad Company *et al., vs.* M. R. Hendricks, adm'r, etc., referred to in the opinion filed in this cause, all as appears of record and now on file in my office.

Seal Supreme Court of Tennessee, Western Division, Jackson, Tenn.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in the city of Jackson, this the 30th day of July, 1890, and of the Independence of the United States the 115th year.

JNO. W. BUFORD, *Clk.*

238 THE UNITED STATES OF AMERICA:

R. S. Daughtry, administrator of Jno. W. Daughtry, dec'd, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, wherein The Kansas City, Fort Scott and Memphis Railroad Company is plaintiff in error and you are defendant in error, to show

cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15 day of May, in the year of our Lord one thousand eight hundred and ninety.

P. TURNEY,
Chief Justice Supreme Court, Tennessee.

On this the fourteenth day of August, in the year of our Lord one thousand eight hundred and ninety, personally appeared H. Crater before me, the subscriber, and makes oath that he delivered a true copy of the within citation to R. S. Daughtry, administrator of the estate of John W. Daughtry, deceased, on the 24th day of July, 1890.

H. CRATER.

Subscribed and sworn to before me at Memphis, Tennessee, this August 14th, 1890.

E. S. HAMMOND,
U. S. District Judge, W. D. Tenn.

239 [Endorsed:] Citation. I hereby acknowledge service of the within citation. May 26th, 1890. M. R. Patterson, counsel and attorney for R. S. Daughtry, administrator of the estate of Jno. W. Daughtry, deceased, in the circuit court of Shelby county and in the supreme court of Tennessee.

240 The Supreme Court of the United States.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILROAD COMPANY, Plaintiff in Error,
vs.
R. S. DAUGHTRY, as Administrator of the Estate of John W. Daughtry, Deceased, Defendant in Error.

Assignment of Errors.

Afterwards, to wit, on the third Friday of October, eighteen hundred and ninety, at the October term for eighteen hundred and ninety of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes the said Kansas City, Fort Scott & Memphis Railroad Company, by Wallace Pratt, its attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

1.

That upon the filing of the petition and bond in the circuit court of Shelby county on the 29th day of May, 1889, to remove the cause to the United States circuit court, as shown by the record, the State

circuit court lost jurisdiction of the case; that its order entered June 1st, 1889, refusing the prayer of the petition was erroneous; that all subsequent proceedings in said court were and are void for want of jurisdiction, and that the supreme court of Tennessee committed error in affirming the judgment of the circuit court in that behalf.

241 2.

WALLACE PRATT,
Attorney for Plaintiff in Error, 9th & Broadway St.,
Kansas City, Mo.

242 [Endorsed:] Kansas City, Fort Scott & Memphis R. R. Co. *vs.* R. S. Daughtry, adm'r, &c. Assignment of errors.

Endorsed on cover: Tennessee supreme court. No. 1361. The Kansas City, Fort Scott and Memphis Railroad Company, plaintiff in error, *vs.* R. S. Daughtry, administrator of John W. Daughtry, deceased. Filed October 9, 1890.

Office Supreme Court
FILED.
NOV 24 1890

IN THE

Supreme Court of the United States.

THE KANSAS CITY, FORT SCOTT AND MEMPHIS RAILROAD COMPANY,
Plaintiff in Error,
vs.
R. S. DAUGHTRY, as Administrator of JNO. W. DAUGHTRY, Deceased,
Defendant in Error.

No. 1361.

IN ERROR FROM THE SUPREME COURT OF TENNESSEE.

Brief for Plaintiff in Error on Motion of Defendant in Error to Dismiss or Affirm.

WALLACE PRATT,
Attorney for Plaintiff in Error.

KANSAS CITY, MO.:
SIDNEY F. WOODY, PRINTER, 613 DELAWARE ST.
1890.

IN THE

Supreme Court of the United States.

THE KANSAS CITY, FORT SCOTT AND MEMPHIS RAILROAD COMPANY,
Plaintiff in Error,
vs.
R. S. DAUGHTRY, as Administrator of JNO. W. DAUGHTRY, Deceased,
Defendant in Error.

No. 1361.

IN ERROR FROM THE SUPREME COURT OF TENNESSEE.

Brief for Plaintiff in Error on Motion of Defendant in Error to Dismiss or Affirm.

STATEMENT OF THE CASE.

This was a suit commenced in the Circuit Court of Shelby County, Tennessee, by R. S. Daughtry, as administrator of the estate of John W. Daughtry, deceased, against the Kansas City, Fort Scott & Memphis Railroad Company, plaint-

iff in error here, and the Kansas City, Memphis & Birmingham Railroad Company.

The suit was begun on the 16th day of August, 1888, by the issuance of a summons, returnable to the September term of the court.

The declaration was filed within the first three days of the term, as required by law. It charged that plaintiff's intestate had lost his life by being run over by a train of cars, and in summing up the wrong done, concluded: "That his intestate was cut off in full possession of all his powers, in the early prime of life, and in broad, open day, without the slightest warning, by the said wrongful conduct of defendants, in such manner as to make those witnessing shudder and cry out with horror at the reckless and bloody deed, to the damage of plaintiff thirty thousand dollars," etc.

The Kansas City, Memphis & Birmingham Railroad Company filed pleas to the merits at the same term, September 25th, 1888.

The Kansas City, Fort Scott & Memphis Railroad Company filed no pleas and entered no appearance whatever in the case until May 29th, 1889, when it filed in the Circuit Court its petition and bond to remove the case to the United States Court for the proper district.

This petition alleged that the plaintiff was a citizen of Tennessee; that petitioner was a corporation under the laws of Arkansas, Missouri and

Kansas; that its co-defendant, the Kansas City, Memphis & Birmingham Railroad Company, was a corporation under the laws of Tennessee, but that the latter was in no way interested in the suit, had nothing whatever to do with the acts resulting in the death of Daughtry, and that it had been joined as a nominal party defendant for the sole purpose of preventing a removal of the case to the United States Court.

On the first day of June following this petition was called to the attention of the court in the presence of opposing counsel, who thereupon filed an affidavit, made by the plaintiff, in these words:

"This day personally appeared before the undersigned, clerk of the circuit court of said county and State, R. S. Daughtry, who, after being duly sworn, states that he is the plaintiff in this cause; that he is a citizen of the State of Arkansas, and has been a citizen of said State for the last ten years; that all the beneficiaries in said suit are also citizens of the State of Arkansas and have been for the last ten years."

The State court, upon the filing of this affidavit, refused to surrender its jurisdiction, and on the same day, to-wit, June 1st, 1889, entered on its minutes an order to that effect, in the following words:

"This day the defendant the Kansas City, Fort Scott & Memphis Railroad Company presented to the court its petition and bond to remove this case to the Circuit Court of the United States for the Western Division of the Western District of Ten-

nessee, which was filed herein on May 29th, 1889, and the court, having duly considered said petition, together with the affidavit of R. S. Daughtry filed herein June 1st, 1889, and heard argument of counsel, is of the opinion that upon said petition and affidavit said defendant is not entitled to the order of removal prayed in its said petition, and its application in that behalf is denied; and said defendant is allowed one day to plead to the merits; to all of which the said Kansas City, Fort Scott & Memphis Railroad Company, by its attorney, excepts, and asks that its exceptions be noted of record, which is accordingly done."

The petitioner then filed pleas to the merits, and June 6th following the trial of the case was commenced before a jury. The next day, after the evidence was in, plaintiff dismissed as against the Kansas City, Memphis & Birmingham road, and the jury returned a verdict of eight thousand dollars against the Fort Scott company, upon which a judgment was entered. A new trial having been refused, that company took an appeal in the nature of a writ of error to the Supreme Court of Tennessee, where, among other things, it assigned for error the action of the circuit court in refusing to order the case removed to the United States Court.

It happened that when this case was argued in the Supreme Court of Tennessee the judges had under consideration the case of *C., O. & S. W. R. R. Co. v. Hendricks*, which was very much like this one, and involved almost identical questions as to the right of removal. They were both decided

the same day, and written opinions were filed in each case. In this case the Chief Justice, TURNEY, writing the opinion, simply said:

"We have passed upon the question of removal to the federal court in a case just disposed of, with very similar facts, *C., O. & S. W. R. R. Co. v. Hendricks, Admr.*"

As that opinion was referred to, it becomes a part of the opinion in this case, and as such has been incorporated in the record.

In that opinion the court distinctly took the position that the State circuit court had the right to examine and determine for itself whether the allegations of fact contained in the petition were true, and to require the petitioner not only to allege, but to *prove in the State court*, that the case was one which was removable.

To reverse and vacate the judgment rendered in the Supreme Court of Tennessee, affirming the judgment of the Circuit Court of Shelby County, the Kansas City, Fort Scott & Memphis Railroad Company sued out this writ of error, and has superseded the judgment pending the decision of this court.

For a full understanding of the case it should be stated that the body of the summons, in describing the parties defendant, uses this language:

"You are hereby commanded to summons the Kansas City, Fort Scott & Memphis Railroad Company and the Kansas City, Memphis & Birmingham

Railroad Company, both of which are railroad companies conducting business in Shelby county, Tennessee, with offices and agencies in said county and State, if to be found in your county," etc.

The return on the summons was as follows:

"Executed on the Kansas City, Fort Scott & Memphis Railroad Company by reading the contents of this writ to J. H. Sullivan, Supt. of said railroad Co., he being the highest officer to be found in my county.

"And executed on the Kansas City, Birmingham and Memphis Railroad Company by reading the contents of this writ to J. H. Sullivan, Supt., he being the highest officer of said Co. to be found in my county.

"This 23rd day of August, 1888.

"W. D. CANNON, *Shff.*

"By E. E. COLBY, *D. S.*"

The first count of the declaration commences:

"Plaintiff, as administrator of Jno. W. Daughtry, sues the defendants, who are corporate persons, doing business as such in Tennessee (under license and by consent of the State), for the sum of $30,000, and demands a jury," etc.

There is nothing else in the declaration or record as made, down to the filing of the petition, in any way describing the defendants.

II.

The only error assigned by the plaintiff in error is that all proceedings in the State court after the filing of its petition and bond for removal to the United States court were void for want of juris-

diction. And the contention is that the judgment which has been entered against it and affirmed in the Supreme Court of Tennessee must be vacated.

III.

The defendant in error has appeared and moved to dismiss the writ of error for want of jurisdiction, to which is added a motion to affirm the judgment upon the ground that it is manifest that the writ of error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument

The only questions to be considered are those thus raised.

We consider them in order:

1.

Defendant in error rests his motion to dismiss upon what he states as four grounds. The first is for want of jurisdiction; second, because no proof was offered in the State court to sustain the allegation that a domestic corporation was joined as a nominal party defendant for the sole purpose of preventing a removal to the federal court; third, because the affidavit of the plaintiff filed in the State court traversing the allegations of the petition for removal showed that the requisite diverse citizenship did not exist; and fourth, because the petition was filed too late.

We understand that this court will only dismiss a writ of error for want of jurisdiction, either of the persons of the parties, or of the subject matter of the controversy.

No question is made as to the regularity of the writ and its service. Does the record then present a federal question decided by the State courts of Tennessee adversely to plaintiff in error? It does distinctly show that such a question was presented and decided, to-wit: Whether an issue of fact as to the truth of the allegations of a petition for removal can be made in the State court, and decided by it. The Tennessee Circuit and Supreme Courts have decided that it can. It is clear that this is a federal question.

The only reply of defendant in error to this is that the petition was not filed within the time required by the act of Congress.

Neither the Circuit Court nor the Supreme Court of Tennessee has rendered any such decision; and this must not be forgotten in considering any aspect of this case.

But if it had rendered such a decision, would it not, in deciding the point, have determined a federal question?

Whether the petition was filed in time is purely a question of law which must be determined by looking to the act of Congress, to the statute and general law of Tennessee, and to the

record made in the case down to the time when the petition was filed. There is in this very case a controversy as to what that portion of the removal act relating to the time of filing the petition means. The brief of opposing counsel is devoted almost wholly to a discussion of the point; and it cannot be determined without construing the act. The State court had the right to decide the question of law for itself. But the decision, right or wrong, would be subject to review here on writ of error if it was against a right claimed. Therefore we think it plain that the question of whether the petition was filed in time also involves a federal question.

In any possible aspect, then, on questions which either were or might have been decided, the case is plainly within the jurisdiction of this court as to subject matter; and the motion to dismiss must be denied.

2.

The motion to affirm the judgment must be denied for want of color for the motion to dismiss.

We have seen that a federal question was distinctly raised and decided by the State courts. The regularity of the proceedings by which the case was brought to this court is in no way attacked. This leaves no room to question the jurisdiction, especially as the only other question

which might have been decided (though it was not) contained also a federal question, as we have shown.

We can see no color for the motion to dismiss.

3.

But passing this for the present, we come to the consideration of the propositions arising on the merits; for even if there be color for the motion to dismiss, we understand that this court will not now affirm the judgment unless "it is manifest that this writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

We think we can demonstrate to the satisfaction of the court that the record does not show a case where it would be proper to affirm the judgment under the rule.

Defendants in error contend, first, that the Supreme Court of Tennessee was right in holding that the State circuit court had the right to pass upon the truth of the allegations of the petition, and determine for itself the questions of fact presented thereby; and, second, that the petition was not filed in time.

In order that this court may see exactly the views entertained by the Supreme Court of Tennessee upon the first question, we print the portion of the opinion discussing the point *in extenso*. It

was delivered by Chief Justice TURNEY in the Hendricks case, and is as follows:

"The action is to recover damages for the killing of J. C. Hendricks on December 12, 1887.

"The first assignment of error is upon the refusal of the court to transfer the cause to the United States Circuit Court.

"The grounds of the petition are that petitioner at and before the commencement of suit was, and is now, a citizen of Connecticut, and that Hendricks' administrator was, and still is, a citizen of Tennessee.

"That the controversy is wholly between the petitioner, Newport News & Mississippi Valley Company, and the plaintiff, citizens of different States; that the Chesapeake, Ohio & Southwestern R. R. Co. is neither a necessary nor proper party to this suit.

"That plaintiff has joined said railroad company as a defendant simply for the purpose of endeavoring to defeat petitioner's right of removal; that the course of plaintiff is a fraudulent, unjust and illegal attempt to deprive said United States Court of its lawful jurisdiction, as well as a fraud on petitioner's right, etc.; that in 1888 plaintiff commenced his suit against the defendants for the same matters and things set forth and complained of; that after beginning suit plaintiff dismissed his said action against the C., O. & S. W. R. R. Co. and proceeded alone against petitioner.

"Thereafter, on one of the days of March term, 1888, petitioner filed a petition for the removal of the cause to the Circuit Court of the United States. The circuit court of the State granted the prayer, etc.

"Afterwards plaintiff dismissed that suit, having theretofore begun the present one against the two companies, joining the latter fraudulently and for the single purpose of divesting the federal

court of its jurisdiction, and depriving petitioner of its right, etc., he having no claim whatever against the C., O. & S. W. R. R. Co.; that by his dismissal of his former suit the plaintiff admitted and confessed that he had no cause of action against the party and that his sole cause of action was against petitioner alone.

"The petition was answered with a definite denial of all fraud, of any admission or confession that the petitioner was alone liable, and insisting that both corporations were jointly and severally liable. That prayer of the petition was refused. It is here insisted, 'The sole question upon the petition for the State court to determine was whether upon the face of the petition a good cause for removal was made. If so, then the removal was a matter of right and of course, subject, however, only to inquiry in the federal court as to the truth of the allegations of the petition.'

"To support this position reference is had to several cases from the United States Supreme Court. The latest utterance to which our attention has been called is in the case of *L. & N. R. R. Co. v. Wangelin*, 132 U. S. Reports, 599, in which Justice GRAY says: 'It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the State court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court.'

"While in the case before us there is an allegation of fraud which is denied, there was no

proof offered to sustain it. The condition of the record in the State court at the time of filing the petition was not such as to warrant a removal. Trying the question by the face of the record, the jurisdiction of the State court was exclusive. That condition is sought to be changed by the unsworn petition of the defendant below, who asked for a removal upon extraneous allegations without proof.

"In *Stone v. Carolina*, 117 U. S. R. 432, Chief Justice WAITE says: 'A State court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. * * * * The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this, the suit must be one that may be removed and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the State court in the case ends and that of the circuit court begins.'

"In this case no application was made to the federal court, and of course that court could not settle the question. The federal question of removal was presented to the State court, and before that court could be authorized to order the removal it was its duty to ascertain and determine that 'a case has been made which on its face shows that the petitioner has a right to the transfer,' and 'it was not bound to surrender its jurisdiction' before.

"We are unable to agree with the counsel for the petitioner that the language of the supreme court in construing the statutes of removal means that a petition like the present without more ousts

the State court of its jurisdiction and transfers it to the federal court.

"This may be so when the petition and bond are filed in the latter court and the duty of investigation imposed upon it. Such is clearly, we think, the true meaning of the cases. The right to petition attaches to either court at the election of the petitioner, but when he has made his election he must submit to that election for all the purposes and provisions of the statutes under which he is proceeding, and when either has passed upon the questions he is bound by the ruling, except he may appeal from the final judgment of the State court when perhaps he cannot from that of the federal court.

"When the supreme court says the petitioner must make a case for removal, it means he must make it under the statute and to the satisfaction of the court to which he makes the application, and not that he can by piecemeal try the question in the two courts. If the contention is sound, we will have the anomaly of a cause removed from the State court and suspended until the federal court can pass upon the merits of the application, the parties in the meantime not knowing where the cause pends, and neither court knowing which has jurisdiction.

"Since this opinion was filed it has been suggested that under the act of Congress of 1887 the application for removal can be made only in the State court. If this were so, it affords a stronger reason that that court must pass upon the sufficiency of the grounds laid for removal.

"A case must be made for removal and made to the court asking to remove under the rule insisted upon; every case involving the jurisdictional amount could be removed or its trial retarded until after action of a federal court. Under the rule in this State there is nothing in the allegation that the dis-

missal of the former suit as to one of the parties was an admission that there was no cause of action against that party as tort feasor, and jointly and severally liable."

Diametrically opposed to the above opinion of the learned Chief Justice is the opinion of this court, delivered by Chief Justice WAITE in *B., C. R. & N. R. R. Co. v. Dunn*, 122 U. S. 513. In that case, as in this, the party opposing the removal had filed in the State court an affidavit denying the allegation of the petition as to citizenship. The State court, taking the affidavit to be true, refused to permit the removal. In disposing of the case this court said:

"The assignment of errors presents but a single question, and that is, whether, as after the petition for removal had been filed the record showed on its face that the State court ought to proceed no further, it was competent for that court to allow an issue of fact to be made upon the statements in the petition, and to retain the suit because on that issue the railway company had not shown by testimony that the plaintiff was actually a citizen of Minnesota.

"It must be confessed that previous to the cases of *Stone v. South Carolina*, 117 U. S. 430, 432, and *Carson v. Hyatt*, 118 U. S. 279, decided at the last term, the utterances of this court on that question had not always been as clear and distinct as they might have been. Thus, in *Gordon v. Longest*, 16 Pet. 97, in speaking of removals under Section 12 of the Judiciary Act of 1789, it was said, p. 103, 'It must be made to appear to the satisfaction of the State court that the defendant is an alien, or a citizen of some other State than that

in which the suit was brought'; and in *Railway Company v. Ramsey*, 22 Wall. 322, 328, that, 'If, upon the hearing of the petition, it is sustained by the proof, the State court can proceed no further.' In other cases expressions of a similar character are found which seem to imply that the State courts were at liberty to consider the actual facts as well as the law arising on the face of the record, after the presentation of the petition for removal. At the last term it was found that this question had become a practical one, about which there was a difference of opinion in the State courts, and to some extent in the circuit courts, and so, in deciding *Stone v. South Carolina*, we took occasion to say: 'All issues of fact made upon the petition for removal must be tried by the circuit court, but the State court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. It is true, as was remarked by the Supreme Judicial Court of Massachusetts in *Amy v. Manning*, 144 Mass. 153, that this was not necessary to the decision in that case, but it was said on full consideration and with the view of announcing the opinion of the court on that subject. Only two weeks after that case was decided, *Carson v. Hyatt* came up for determination, in which the precise question was directly presented, as the allegation of citizenship in the petition for removal was contradicted by a statement in the answer, and it became necessary to determine what the fact really was. We there affirmed what had been said in *Stone v. South Carolina*, and decided that it was error in the State court to proceed further with the suit after the petition for removal was filed, because the circuit court alone had jurisdiction to try the question of fact which was involved. This rule was again recognized at this term in *Carson v. Dunham*, 121 U. S. 421, and is

in entire harmony with all that had been previously decided, though not with all that had been said in the opinions in some of the cases. To our minds it is the true rule, and calculated to produce less inconvenience than any other.

"The theory on which it rests is, that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then to the State court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the State court has a right to decide for itself, and if it errs in keeping the case and the highest court of the State affirms its decision, this court has jurisdiction to correct the error, considering for that purpose only the part of the record which ends with the petition for removal. *Stone v. South Carolina*, 117 U. S. 430, and cases there cited.

"But even though the State court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his petition, in the circuit court and have it docketed there. If the circuit court errs in taking jurisdiction, the other side may bring the decision here for review, after final judgment or decree, if the value of the matter in dispute is sufficient in amount. *Railroad Company v. Koontz*, 104 U. S. 5, 15. In that case, the same writ as in the writ of error to the State court, the question will be decided on the face of the part of the record of the State court which ends with the petition for removal, for the circuit court can no more take a case until its jurisdiction is shown by the record than the State court can be required to let it go un-

til the record shows that its jurisdiction has been lost. The questions in the two courts will be identical and will depend on the same record, namely, that in the State court ending with the petition for removal. The record remaining in the State court will be the original; that in the circuit court, an exact copy.

"But, inasmuch as the petitioning party has the right to enter the suit in the circuit court, notwithstanding the State court declines to stop proceedings, it is easy to see that if both courts can try the issues of fact which may be made on the petition for removal, the records from the two courts brought here for review will not necessarily always be the same. The testimony produced before one court may be entirely different from that in the other, and the decisions of both courts may be right upon the facts as presented to them respectively. Such a state of things should be avoided if possible, and this can only be done by making one court the exclusive judge of the facts. Upon that question there ought not to be a divided jurisdiction. It must rest with one court alone, and that, in our opinion, is more properly the circuit court. The case can be docketed in that court on the first day of the next term, and the issue tried at once. If decided against the removal, the question is now, by the act of March 3, 1887, c. 373, 24 Stat. 552, put at rest, and the jurisdiction of the State court established in the appropriate way. Under the act of March 3, 1875, c. 137, 18 Stat. 470, such an order could have been brought here for review by appeal or writ of error, and to expedite such hearings our Rule 32 was adopted."

In *Crehore v. Ohio, etc., R. R. Co.*, 131 U. S. 240, the views first announced in *Stone v. South*

Carolina, 117 U. S., and in *Carson v. Hyatt*, 118 U. S. 287, cited above, were again approved.

The Tennessee Supreme Court seems to have supposed that the case of *Louisville & Nashville R. R. Co. v. Wangelin*, 132 U. S. 599, makes some change in the rule, and it quotes, as sustaining this idea, a portion of the opinion of this court in that case, as follows:

"It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the State court at the time of the filing of the petition for removal independently of the allegations of the petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court."

It is a sufficient answer to this to say that the court was dealing with a case which had been removed from a State court by a petition. A motion to remand had been made in the federal court, and the petitioner had there failed to prove the allegations of his petition. The federal court had ordered the case remanded, and the case was in this court on a writ of error to correct that order.

As to the suggestion in the opinion that the filing of a petition, sufficient on its face, without proof of the truth of its allegations, is sufficient to

oust the State court of its jurisdiction only when it is filed in the federal court, and the further suggestion that the petitioner has his election whether he will file his petition and bond in the federal court or the State court, it is sufficient to say that by the third section of the act of 1875, regulating the removal of causes, it is provided that the party entitled to remove "may make and file a petition in such suit *in such State court*"; and this language is repeated in the act of 1887 on the same subject.

We think it self-evident that the decision of the Supreme Court of Tennessee is in direct conflict with the decisions of this court. And we are content to leave this branch of the case, with what has been said, and the single additional observation that the petition distinctly alleged that the K. C., M. & B. R. R. Co. had been made a nominal party defendant for the sole purpose of preventing a removal to the federal court.

In *Pirie v. Tvedt*, 115 U. S. p. 41, it was suggested by Mr. Justice HARLAN, in a dissenting opinion, that the convenient device of joining a nominal party defendant for the purpose of preventing the jurisdiction of the federal court would often be employed. In all the opinions of this court, delivered since, where the subject is mentioned, it seems to be admitted that where this is done, if it can be proven, it will not be

suffered to defeat the jurisdiction. See *Plymouth Co. v. Amador & Sacramento Co.*, 118 U. S. 264, and *L. & N. R. R. Co. v. Wangelin*, 132 U. S. 601. Indeed, this must be so, for to hold otherwise would be to allow a citizen entitled to a trial in the federal courts to be deprived of his right by a fraud. Counsel for the motion practically concede this, for no point is made upon it.

Second. It is said the petition was not filed in time.

Under the Removal Act of 1887, a party desiring a removal "may make and file a petition in such suit in such State court at the time, or at any time before the defendant is required, by the laws of the State or the rule of the State court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff."

By Sec. 4238 of Thompson & Steger's Statutes of Tennessee (Sec. 5010, Milliken & Vertrees' Code) it is provided:

"The declaration of the plaintiff shall be filed within the first three days of the term to which the writ is returnable; otherwise the suit may, upon motion of the defendant, be dismissed at plaintiff's cost."

And by the succeeding section it is provided:

"The defendant shall appear and demur or plead within the first two days after the time allotted for filing the declaration; otherwise the plaintiff may have judgment by default."

The record shows the Kansas City, Fort Scott

& Memphis Railroad Company to have been a foreign corporation doing business in Tennessee, but not incorporated under its laws. It becomes material to look at the service which was had upon it.

The statutory law relating to service of process on corporations in force prior to 1887 is embraced in Sections 2831, 2832, 2833 and 2834, and as later amended by Sections 2834a and 2834b of Thompson & Steger's Statutes of Tennessee.

Those sections are as follows:

"2831. Service of process on the president or other head of a corporation, or, in his absence, on the cashier, treasurer or secretary, or, in the absence of such officers, on any director of such corporation, shall be sufficient." (Act 1845-6, ch. 55, Sec. 2; 1851-2, ch. 136.)

"2832. If neither the president, cashier, treasurer or secretary resides within the State, service on the chief agent of the corporation residing at the time in the county where the action is brought, shall be deemed sufficient." (Act 1849-50, ch. 136.)

"2833. If the action is commenced in the county in which the corporation keeps its chief office, the process may be served on any one of the foregoing officers, in the absence of those named before him."

"2834. When a corporation, company or individual has an office or agency in any county other than that in which the principal resides, the service or process may be on any clerk or agent employed therein, in all actions growing out of or connected with the business of the office or agency."

"2834a. That Sections 2831, 2832, 2833 and 2834 be so amended that hereafter when a corpora-

tion, company or individual has an office or agency *or resident director* in any county other than that in which the *chief officer* or principal resides, the service of process may be *made* on any agent or clerk employed therein, in all actions *brought against said company, growing out of the business of or connected with said company or principal's business.*" (Act 1859-60, ch. 89, Sec. 1.)

"2834b. The provisions of this act shall only apply to cases where the action is brought in such counties as such agency, resident director or office is located. (13, Sec. 2.)

In Thompson & Stegner's Statutes of Tennessee of 1871, from which the above sections are quoted, Section 2834 was so printed that it read, "when a corporation, company or individual has an *officer* or agency or resident director," etc., instead of "office" as above. When Milliken & Vertrees' Code was printed, in 1884, the word was again printed "officer." (Section 3539, M. & V. Code.) This code never was enacted as a whole by the legislature, and stands merely as a compilation by private parties. The supreme court has in three cases held that this was evidently a misprint. *Toppins v. Railroad*, 5 Lea, 604; *Railroad v. Walker*, 9 Lea, 481; *Telephone Co. v. Turner*, 4 Pickle, 267. Reference to the volume containing the Acts of 1859-60, chap. 89, Sec. 1, page 87, printed at Nashville by authority, shows that this was the fact, and that the word in the act as passed was "office" and not "officer."

March 29th, 1887, the legislature passed still another act, reading as follows:

"An Act to Subject Foreign Corporations to Suit in this State.

"SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, that any corporation claiming existence under the laws of any other State, or of any country foreign to the United States, found doing business in this State, shall be subject to suit here, to the same extent that corporations of this State are, by the laws thereof, liable to be sued so far as relates to any transaction had in whole or in part within this State, or any cause of action arising here, but not otherwise.

"SEC. 2. Be it further enacted, that any corporation having any transaction with persons or having any transaction concerning any property situated in this State, through any agency whatever, acting for it within the State, shall be held to be doing business here within the meaning of this act.

"SEC. 3. Be it further enacted, that process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of such agent it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom issued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this State were sued, and the process has been served as required by law; but in order that defendant cor-

poration may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, the postage and fees for which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty (30) days after the date of such mailing.

"SEC. 4. Be it further enacted, that it shall be the duty of the plaintiff to lodge at the home office of the company, with any person found there, a written notice from him or his attorney, stating that such suit has been brought, accompanied by a copy of the process and the return of the officer thereon, of which fact affidavit shall be made by the person lodging the same, stating the facts and with whom the notice was lodged, or else the plaintiff or his attorney shall make an affidavit that he has been prevented from serving such notice by circumstances which should reasonably excuse giving it, which circumstances the affidavit of the plaintiff or his attorney shall particularly state; and no judgment shall be taken until one or the other of these affidavits shall be filed and the court be satisfied that the notice has been given the defendant, or that the excuse for not doing so be sufficient.

"SEC. 5. Be it further enacted, that this act take effect from and after its passage, the general welfare requiring it." (Acts of 1887, ch. 226.)

On the above state of law and fact, it is the contention of the plaintiff in error that when its petition for removal was filed, to-wit, May 29th, 1888, it had never been served with process so as to require it to answer or plead to the declaration;

that the filing of its petition was its first appearance, and voluntary; and that therefore it was of necessity filed in time.

We discuss this point in three aspects.

The first position is that the defendant below, a foreign corporation, could only be served in the manner pointed out by the act of 1887, which was not done.

That act was passed at the first session of the legislature following the decision of Judge JACKSON upon the circuit, in *United States v. American Bell Telephone Co.*, 29 Federal Reporter, 17, and was evidently drawn by one familiar with that decision. The act, on its face, purports to apply to all foreign corporations without exception, and limits the liability to suit to causes of action accruing within the State. Counsel for the railroad company always supposed that the method of service pointed out in that act upon foreign corporations was exclusive of all other modes, and it never occurred to them that there could be any doubt on this point until the appearance of the decision of the Supreme Court of Tennessee in *Telephone Co. v. Turner*, 4 Pickle, 265. That decision was rendered December 5th, 1889, while this case was pending in the Supreme Court of Tennessee. It held that that act did not apply to foreign corporations having an office and resident agent in the State; that they could still be served under the laws in force before that time, and

that the act of 1887 was not a limitation but an enlargement of the jurisdiction over such foreign corporations.

If this holding be correct, foreign corporations with an office and resident agent are still liable to be sued in Tennessee for causes of action arising elsewhere, though the act expressly declares that such is not the case.

We respectfully submit that the holding of the court is plainly contrary to the manifest intent of the language used, and the words of the act do not permit the construction which has been given it.

This court will exercise an independent judgment on this question, and will not follow the decision of the Supreme Court of Tennessee unless it considers it right, especially as the rights of the railroad company accrued before the decision in the telephone case was rendered.

Burgess v. Seligman, 107 U. S. p. 20.

The next position is that the record does not show any valid service under Sections 2831, 2832, 2833, 2834, 2834a, 2834b, before set out.

Bearing in mind that the return of the sheriff simply informs the court that the writ was executed on J. H. Sullivan, "Supt. of said Co., he being the highest officer to be found in my county," and that this return is not aided by any other fact shown by

the record, let us turn again to the law relating to the service of process on corporations.

It is manifest that the return does not show that service was accomplished under Section 2831, because Sullivan was neither president, cashier, treasurer, secretary nor director of the company.

It shows no service under Section 2832, because it fails to state that neither the president, cashier, treasurer nor secretary resided within the State, or that Sullivan was the chief agent of the corporation residing at the time in the county where the action was brought.

Coming now to Section 2834a, we find that the body of the summons declares that the defendants had "offices and agencies in said county and State." But neither the body of the summons, nor the return of the sheriff, nor any other part of the record states that the chief officer of the defendant corporation did not reside in that county. Nor does it show that Sullivan was "any agent or clerk employed therein"—*i. e.*, in such office or agency. He is simply described as "Supt. of said Co." and "the highest officer to be found" in the county.

The facts stated on the face of the record are not, in these particulars, sufficient to show that the State court had acquired jurisdiction of the person of the defendant prior to the filing of the petition and bond for removal. Before this court can hold that it had obtained such jurisdiction, it must pre-

sume the existence of two other vital facts, to-wit: that the chief officer of the Kansas City, Fort Scott & Memphis Railroad Company did not reside in Shelby county, and that Jno. H. Sullivan, "Supt. of said Co.," was an agent or clerk employed in an office or agency of the corporation located in that county.

Will this court presume, in aid of the return, that these facts existed?

In discussing this question it is well to remember at the beginning that the State courts of Tennessee have not themselves presumed the existence of these facts. Nor have they decided by implication, or otherwise, that the petition was filed too late. They have planted their action squarely upon the ground that the circuit court had the right to require proof of the truth of the allegation of the petition.

But even if it were a fact that the State Supreme Court had expressly decided that the petition was filed too late, we do not consider that such decision would in any way affect the consideration of the question in this court. It is not the construction of a State statute which is involved, but the sufficiency of a record. There is no question as to what is required to be done by the statute. The question is whether the record shows that a sheriff has done what the statute requires. This is to be determined by principles of general jurisprudence, concerning which the federal courts exercise an independent judgment. Such is the effect of *St. Clair v. Cox*, 106 U. S., hereafter fully reviewed.

But we pass this, and discuss the point on its merits.

We submit that this court has expressly and clearly decided that no such presumptions can be indulged in favor of a record, or of a return. Such we conceive to be the effect of *St. Clair v. Cox*, 106 U. S. 350; *Settlemier v. Sullivan*, 97 U. S. 444; *Galpin v. Page*, 18 Wallace, 350; *Alexandria v. Fairfax*, 95 U. S. 774; and *Amy v. Watertown*, 130 U. S. 316. *St. Clair v. Cox* was a case where a record of a judgment obtained by default in a State court of Michigan was offered in evidence in another suit. It was objected to on the ground that it failed to show that the court had acquired jurisdiction of the person of the defendant corporation. The return of the officer was in the record, and showed that he had executed the process "by delivering a copy of the same to Henry J. Colwell, Esq., agent of said Winthrop Mining Company, personally, in said county." The laws of Michigan permitted foreign corporations to do business in the State and provided, further, that "in suits commenced by attachment in favor of a resident of this State against any corporation created by or under the laws of any other State, government or country, if a copy of such attachment and of the inventory of the property attached shall have been personally served on any officer, member, clerk or agent of such corporation within this State, the same proceedings shall be had thereon," etc., making it equivalent to personal service of a summons.

It was urged that the return of the officer was deficient, because it failed to state that the defendant was engaged in business in the State of Michigan. The question was fully discussed and the objection held valid. The court, in deciding the case, said:

"* * * It is sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court—that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, a certificate of service by the proper officer on a person who is agent there, would in our opinion be sufficient *prima facie* evidence that the agent represented the company in the business. * * * In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the State when the service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the State court, gave no information on the subject. It did not therefore appear even *prima facie* that Colwell stood in any such representative character to the company as would justify the service of the copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation."

The case of *Settlemier v. Sullivan*, 97 U. S. p. 444, is directly in point. In that case a judgment was recovered by Walker against Magers in a State court of Oregon. The process was not served upon the defendant personally, but was served upon his wife, according to the return of the sheriff, by delivering copies to her "at the usual place of abode," she being "a white woman of over fourteen years of age." The return did not state that the defendant could not be found, nor was any reason assigned why personal service was not made on him. The statute of Oregon in force at the time read as follows:

"The summons shall be served by delivering a copy thereof together with a copy of the complaint, prepared by the plaintiff, his agent or attorney, as follows: * * * In all other cases to the defendant, *or if not to be found*, to some white person of the family above the age of fourteen years, at the dwelling-house or usual place of abode of the defendant."

The defendant did not appear, and a judgment by default was entered against him, the entry on the minutes of the court containing the statement that the "defendant, although duly served with process, came not, but made default."

Upon this judgment an execution was issued, and the land of defendant sold. The purchaser at that sale then brought an action for its possession in the United States court. To sustain the claim,

the record of the State court was produced, omitting, however, the process and return. Over objection, the court permitted the other party to add this, and the circuit court then instructed the jury that the judgment was void for want of jurisdiction in the State court over the person of defendant. To reverse this a writ of error was sued out to this court.

The objection to the record was that the return of the sheriff did not recite that the defendant could not be found.

To this it was replied that the judgment entry recited that the defendant had been duly served with process.

But this court held that the return of the sheriff, being in the record, must prevail, and that the judgment was void, because the court would not presume that the defendant could not be found, in the absence of a statement in the return to that effect.

In passing upon the point, the court said:

"We do not question the doctrine that a court of general jurisdiction acting within the scope of its authority—that is, within the boundaries which the law assigns to it with respect to subjects and persons—is presumed to act rightly, and to have jurisdiction to render the judgment it pronounces until the contrary appears.

(In the case at bar the State court has not in any way asserted that it had acquired jurisdiction

before the voluntary appearance of defendant there.)

"But this presumption can only arise with respect to jurisdictional facts concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge; but if the record give the the evidence or make the averment with respect to a jurisdictional fact, it will be taken to speak the truth and the whole truth in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred."

And the court held that the judgment was void.

Three of the judges dissented. But the whole bench agreed that the return of the sheriff did not state all the facts necessary to make the judgment good. The dissenting judges held that the recital in the record that defendant had been duly served ought to prevail.

A full discussion of the principles governing the admission of presumptions in support of judgments rendered by courts of general jurisdiction is to be found in *Galpin v. Page*, 18 Wall. 350. The syllabus states the points decided there as follows:

"The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to

jurisdictional facts concerning which the record is silent. When the record states the evidence or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred.

"The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, and over proceedings which are in accordance with the course of the common law.

"When by legislation of a State constructive service of process by publication is substituted in place of personal service, and the court upon such constructive service is authorized to proceed against the person of an absent party, not a citizen of a State nor found within it, the statutory provisions must be strictly pursued."

Bearing in mind that no proceedings to subject a corporation to suit in a foreign jurisdiction are according to the course of the common law, but are purely statutory, the application of the case is apparent.

In *Amy v. Watertown*, 130 U. S. 316, it was said: "The cases are numerous which decide that where a particular method of serving process is pointed out by the statute, that method must be followed, and the rule is especially exacting in reference to corporations." And numerous authorities for the propositions are cited in the opinion.

See also the instructive case of *American Bell Telephone Co. ads. United States*, 29th Federal

Reporter, p. 17, where Judge JACKSON reviews the authorities.

We have been able to find but two instances in which this court has presumed anything in favor of a return.

One is the case of *Railroad v. Brown*, 17 Wall. 445, where the return of the marshal showed service on J. S., "reputed to be one of the directors" of the defendant company. The record showed that at a time about two years previously J. S. was a director. The court said that the fact, being shown to have once existed, would be presumed to continue till the contrary appeared. This was according to an elementary rule of evidence. But the point did not arise in the case, because the court below had opened the judgment on condition that the defendant appeared, which it did, and the case was tried on the merits.

The other instance is in *Knowles v. Gaslight Co.*, 19 Wall. 58. There it was objected to a return of a sheriff that it did not recite that he had served it in his own county. It was held that it would be presumed that he had not served it elsewhere. This was the common sense of the case, for sheriffs are not in the habit of going out of their counties to serve their writs.

In the Supreme Courts of the States we find the current of authority unbroken to the effect

that no presumptions can be indulged in aid of such a return as we have here, so as to make it good.

Railway Company v. Pillsbury, 29th Kan. 652, was a case decided by Mr. Justice BREWER while on the State Supreme Court bench. In delivering the opinion, he said:

"The return on the summons shows that it was served 'by delivering a copy thereof to D. W. March, agent of said U. P. R. R. Co., Manhattan, Kansas.' Where this was served, or what kind of an agent of said defendant said D. W. March was, is not shown. Such service is insufficient. It does not show that said March was president, or chairman of the board of directors, or other chief officer, cashier, treasurer, secretary, clerk or managing agent; and it is therefore not good under Section 68c, c. 80, Comp. Laws 1879, or Section 13, c. 81, *id.* Neither does it show service upon any person named as the service agent of a railway corporation under Sections 68, 68a, 68b, and 68c, c. 80, *id.*, or upon any person authorized to receive service in case of a failure by a corporation to name such service agent, or at a place designated in such sections. For aught that appears, said March may have been an agent to purchase coal, or to transact any temporary business on behalf of the company, with no office or residence in the county. The sections above referred to provide ample and easy means for service upon a railroad corporation. * * * The record must affirmatively show that in some of the ways named in the statute the service has been made."

This case has been recently followed and approved in *Dickerson v. Burlington & Mo. River R. R. in Nebraska*, 23rd Pacific Reporter, 936. In the

latter case the return read: "Served by delivering a copy thereof, with endorsements thereon, duly certified, to Mr. Fish, agent of the within railroad company." The return was held insufficient to support a judgment.

In *McConkey v. McCraney*, (Wisconsin) 37 N. W. Reporter, 822, a statute provided for constructive service "by leaving a copy thereof at defendant's usual place of abode, in the presence of some one of the family of suitable age and discretion, who shall be informed of the contents thereof." The return stated that such copy was left with a person of suitable age and discretion, to whom the contents were explained. But it omitted to state that it was at defendant's usual place of abode. The service was held void.

Swift v. Meyers, 37 Fed. Reporter, 37, is a strong case. The statutes of Oregon provide that if a defendant cannot be found, service may be made by delivering a copy of the summons to "some person of the family, at the dwelling-house or usual place of abode of the defendant." In a suit to enforce the lien of a mortgage, the return showed that defendant could not be found, and that a copy of the summons was delivered "to a member of the family at his usual place of abode in this [Linn] county." There was a judgment by default. The judgment was held void, because the return failed to show that it was delivered at

his usual place of abode in the State, in whatever county it might be.

William Hoen, Respondent, vs. Atlantic & Pacific R. R. Co., 64 Mo. 561, was a case where judgment by default had been entered against a corporation. The return of the sheriff read: "I, C. B. Booth, sheriff of Jackson county, Missouri, certify that I executed this command by leaving a copy of the summons, together with a copy of the petition thereto attached, at a business office of the within named defendant, with A. W. Dickinson, a person having charge thereof, in the absence of the president or chief officer of the defendant."

The statute concerning service provided:

"When any summons shall be issued against any banking or other incorporated company, service on the president, or other chief officer of the company, or, in his absence, by leaving a copy thereof at any business office of said company with the person having charge thereof, shall be deemed sufficient service," etc.

It was held that a judgment entered by default was void because the return did not state that the chief officer was absent from the county, or could not be found in the county. It did state that he was absent. But the court required more. It must state that he was absent from the county. They refused to tolerate any presumption whatever.

Lehigh Valley Insurance Co. v. Fuller, 81 Penn. State Reports, was a case where a judg-

ment by default was rendered against an insurance company. The return was executed "by giving a copy of the writ to C., agent," of the company, "and by summoning him as garnishee, and by making known to him the contents thereof."

The statute provided that the writ might be served upon the agent "at the usual place of business or residence of such agent or clerk," etc. The return not showing affirmatively that it was made at such a place, the court refused to presume that it was, and declared the judgment void.

In *Dickison v. Dickison*, 16 N. E. Reporter, 861 (Ills.), a summons contained the names of a number of defendants. The return was silent as to some of them. A judgment was entered which recited that all were served. It was afterwards held that the summons itself, being in the record, was, under the facts of that case, sufficient to contradict the recital in the decree, and the court refused to presume that those as to whom the return was silent resided in another county, and had been duly served.

The principle that courts will not indulge presumptions in favor of a return has been recognized by the Tennessee Supreme Court in *Earthman v. Jones*, 2 Yerger, 484. See opinion of Judge WHITE, pp. 491, 492.

But it is needless to cite more cases.

Enough has been said to show that the record in this case would not have supported a judgment by default. It is therefore certain that the defendant at the time of the filing of the petition was not before the court so as to be required by the law of the State to plead or answer to the declaration, and the petition was in time.

The third and last point is, that, even conceding the service to have been sufficient to sustain a judgment by default, still the petition was filed in time; because under the State laws and rules of the court its time to plead had not expired. The statutes and practice of Tennessee are peculiar. For a full understanding of the reasoning upon which this contention is based we refer to *Lockhart v. Memphis & Little Rock Railroad Company*, 38 Federal Reporter, 274. The learned judge delivering the opinion in that case has examined the question thoroughly, and discusses it fully. We can add nothing to what he has there said.

In conclusion, we submit with all confidence that the motion to dismiss must be denied, and that the motion to affirm must be denied, both because there is no color for the motion to dismiss, and because upon the merits the case is with the plaintiff in error. We do not think the court will consider the questions presented by this record as so frivolous as not to need further

argument, or that the appeal is taken for delay only. The plaintiff in error is entitled to have this judgment vacated.

Respectfully submitted.

WALLACE PRATT,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
JAN 16 1891
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILROAD COMPANY,

PLAINTIFF IN ERROR,

VS.

R. S. DAUGHTRY,

ADMINISTRATOR OF JOHN W. DAUGHTRY, DECEASED,

DEFENDANT IN ERROR.

MOTION TO DISMISS AND AFFIRM, AND BRIEF FOR DEFENDANT IN ERROR.

LUKE E. WRIGHT,
GEORGE GANTT,
For Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILROAD COMPANY,

PLAINTIFF IN ERROR,

VS.

R. S. DAUGHTRY,

ADMINISTRATOR OF THE ESTATE OF JOHN W. DAUGHTRY, DECEASED.

GROUNDS OF MOTION TO DISMISS.

1st. For want of jurisdiction.

2d. Because no proof was offered to sustain the allegation of fraud in the petition for removal.

The petition alleges that the Domestic Corporation was made a party defendant with the fraudulent intention of depriving the petitioner of the right of removal. No attempt was made to sustain this allegation by proof.

3d. Because the record as it stood when the State Court passed on the question of removal showed that the plaintiff and petitioning defendant were both residents of the same state.

4th. Because the petition for removal was filed too late under the Judiciary Act of 1887. The writ was returnable to the September term of the court. Plaintiff filed his declaration within the first three days of the term as required by the state law.

Defendant, under the state law, had the next two days within which to file its plea. It failed in this, and four terms of

the court elapsed before the petition for removal was filed, during all of which time defendant was in default, and the plaintiff entitled to judge by default whenever demanded.

GROUND OF MOTION TO AFFIRM.

Because the writ of error can have no effect but delay, inasmuch as it fully appears that the action of the State Court in refusing to allow the removal was proper.

[For ready and convenient reference those portions of the record relating to the above motions have been printed and are submitted herewith.]

Geo. Gantt &
Sutle E. Wright
attys. for defts. in error

IN THE SUPREME COURT OF THE UNITED STATES.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILROAD COMPANY,

PLAINTIFF IN ERROR,

VS.

R. S. DAUGHTRY,

ADMINISTRATOR OF JOHN W. DAUGHTRY, DECEASED,

DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

ON MOTION TO DISMISS AND AFFIRM.

STATEMENT OF CASE.

This suit was brought in the Circuit Court of Shelby County Tennessee, by R. S. Daughtry, Administrator of John W. Daughtry, deceased, against the Kansas City, Fort Scott & Memphis Railroad Company, and the Kansas City, Memphis & Birmingham Railroad Company, jointly, for the negligent and wrongful killing of his intestate.

The record shows that the writ was issued on the 16th day of August, 1888, and service regularly obtained on the Superintendent of the defendant companies on the 23d day of August, 1888, and that the declaration was filed on the 17th day of September, 1888, in strict accordance with the Tennessee practice, as regulated by statute.

One of the defendants, the Kansas City, Memphis & Birmingham Railroad Company, a domestic corporation, filed its

plea on the 25th day of September, 1888, while the other defendant, which is a foreign corporation, doing business in Tennessee, failed to plead at the time fixed by law, but filed a petition for removal on the 29th day of May, 1889, after four terms of the court had elapsed.

The petition, which was unsworn to, alleged that the domestic corporation was joined as a party defendant for the purpose of defeating the jurisdiction of the Federal Court; that this constituted a fraud; that the controversy was separable, the petitioner alone being responsible for the wrongs complained of; and that the administrator—plaintiff in the suit—was a resident of Tennessee, while the petitioner was a resident of the states of Arkansas and Missouri.

To this petition the administrator interposed his own affidavit, that he and all the beneficiaries were citizens of the State of Arkansas, and had been for ten years prior to the institution of the suit.

The trial judge denied the petition for removal, and ordered the defendant to plead.

After trial and judgment in the Circuit Court, the case was appealed to the Supreme Court of the State, where it was affirmed, and is reported in 4 Pickle (88 Tenn.), 721.

A writ of error was then sued out to the Supreme Court of the United States, for alleged error in the refusal of the petition for removal, and now stands on motion of defendant in error to dismiss and affirm.

BRIEF ON MOTION TO DISMISS AND AFFIRM.

The case of the Chesapeake, Ohio & Southwestern Railroad Company vs. Hendricks, reported in 4th Pickle (88 Tenn.), 710, involved facts similar to the present case and was referred

to in the opinion of the Daughtry case as decisive of the question of removal.

In that case, as in this, a domestic and foreign corporation were jointly sued, and the allegations of a separable controversy, fraud and diverse citizenship, were made by the petition in the Hendricks case, just as they are made in this.

Judge Turney, in delivering the opinion of the court, held that an allegation of fraud without proof to sustain it will not oust the State Court of its jurisdiction, and that "trying the question by the face of the record, the jurisdiction of the State Court was exclusive."

In support of this view, the language of Justice Gray in 132 U. S., page 601, and of Chief Justice Waite in 117 U. S., page 472, is cited as conclusive of the question.

In the case now before the court, it is perfectly evident that the defendant in seeking a removal was playing fast and loose with the question of jurisdiction. Here was the only real or apparent fraud. Without merit in fact, containing an allegation of diverse citizenship, which was notoriously untrue, and upon which no proof was offered, though it was denied under oath by the administrator both in his affidavit and on the witness stand, the petition was intended merely to delay and embarrass the prosecution of the suit, for, if the removal had been effected, it would necessarily have been remanded to the State Court for trial, as that court alone had jurisdiction of the matters in controversy. The fact that a dismissal was afterward entered as to one defendant is no admission that there was no cause of action against it, as "Tort feasors are jointly and severally liable."

Hendricks vs. R. R. Co., 4 Pickle (88 Tenn.), 710.

The state of the record at the time the petition was filed discloses another distinct ground why the State Court was right

in refusing to remove the case to the Federal Court, under the third section of the judiciary act of March 3, 1887, which is as follows: "Whenever any party entitled to remove any suit mentioned in the next preceding section. * * * may desire to remove such suit from a State Court to the Circuit Court of the United States, may make and file a petition in such suit in such State Court at the time or at any time before the defendant is required by the laws of the State or the rule of the court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."

Sections 5,010, 5,011, 5,012 and 5,013 of the Milliken & Vertrees' Code, relating to the practice in the Circuit Courts of the State of Tennessee, are as follows:

"5,010. The declaration of the plaintiff shall be filed within the first three days of the term to which the writ is returnable otherwise the suit may, upon motion of the defendant, be dismissed at plaintiff's cost.

"5,011. The defendant shall appear and *demur* or *plead* within the first two days after the time allotted for filing the declaration, otherwise the plaintiff may have judgment by default.

"5,012. The plaintiff and defendant shall, within the first two days after each subsequent step taken by the other in making up an issue, demur or plead thereto, on penalty of having the suit dismissed, or judgment taken by default, according as the failure is by plaintiff or defendant.

"5,013. The court may, however, enlarge the time for pleading, upon application of either party, in proper cases, or excuse the failure to plead within the time prescribed, upon good cause shown."

Section 5,011, above referred to, fixes the time for pleading by the defendant, and gives the right to judgment by default if the plea is not filed within the time prescribed.

Under an act passed by the Legislature in 1883, the number of terms of the Circuit Court of Tennessee are increased to five. This act is as follows:

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the act of 1869–70, Chapter 28, Section 9, and all other laws providing for the holding of terms of the Circuit Court of Shelby County are hereby amended, as provided in the second section of this act.

Sec. 2. That hereafter there shall be held five regular terms of the Circuit Court of Shelby County, commencing on the third Mondays in January, March, May, September and November of each year."

This act is embodied in Milliken & Vertrees' Code of Tennessee, Article 3. page 49.

An inspection of the record discloses that the suit was brought to the September term. Under the law a plea was then due within the first two days after filing the declaration, but the defendant did not plead until four terms of the court had elapsed, during all of which time it was in default, and the plaintiff thereby entitled to a judgment.

It would seem superfluous to argue that the petition for removal after four terms of the court had elapsed came too late, taking the language of the Judiciary Act, with its evident purport, and applying it to the practice in Tennessee as fixed by the Code.

The case of Lockhart vs. Memphis & Little Rock Railroad Company in 38 Federal Reporter, 274, is probably the authority relied on by counsel for plaintiff in error in support of the opposite view. That case differs from this in many essential

particulars, the chief of which is that the defendant seeking a removal was not before the court, not having been served with process. But if the decision in that case proceeds upon the ground that as a defendant may plead after the time has elapsed without leave of the court or consent of counsel, where the plaintiff has not taken judgment by default, and that therefore the time of removal lasts as long as the time for pleading, then, under the Act of Congress, the conclusion is unwarranted and cannot be sustained. The time for pleading in the State of Tennessee *is* fixed by statute. If within the time so fixed the defendant does not plead, the plaintiff is entitled to judgment by default. But it is absurd to argue that because he does not take advantage of this right he thereby extends the time for removal. The *right* to *plead*, and the *time required* for pleading are not convertible, and the error into which Judge Hammond seems to have fallen is in confusing the one with the other. Such a construction would substitute the conduct of parties for the positive terms of the statute. Not only would it destroy the manifest intention of the act, and result in vexatious delays and frequent frauds upon the rights of parties, but the definite and certain limits of the Act of Congress fixing the time for removal would be defeated by the indulgence of counsel, or unwillingness to take judgment by default.

So far as our examination has extended, the above decision stands alone in its construction of the Federal Statute. In the case of Kaitel vs. Wylie, 38 Fed. Rep., 865, Judge Blodgett, in strong language, takes the opposite view of the effect of the statute. In that case, the defendant Wylie appeared and moved to quash the summons, which motion was overruled, and instead of pleading at once as he should have done, he filed a petition for removal. Judge Blodgett says: "The statute not

only seems to be imperative by its letter that the application to remove must be made when the plea is due, but such from the course of legislation seems to be the spirit of the later legislation of Congress upon the subject of the removal of causes. For illustration, if defendants had not pleaded at all to the declaration during the return-term, and had, at the opening of the second term, made this application for a removal, I think there could be no doubt that the application came too late; and, it seems to me, the application comes equally too late when it is made after the time when the party is required by law or the rules of court to plead to the declaration, whether the plea has been due six days or six months. Nor does the fact that the plaintiffs in this case amended the declaration by leave of court before the application to remove was filed take the case out of the operation of the rule which I have stated, as about eighteen days intervened after the motion to quash was overruled before the amendment was made, during all which time defendants were in default. I am therefore of opinion that the application for removal was made at too late a day, and that the motion to remand might properly prevail for that reason alone."

The case of Dixon vs. Western Union Telegraph Company, 38 Fed. Rep., 377, is directly in point. The summons was served October 12th, 1888; the law and the summons required the defendant to answer within ten days after service. The petition for removal was filed November 1st, 1888. Judge Sawyer, in delivering the opinion of the court, says:

"Probably there was an extension of time to answer by consent of parties, but it does not appear whether there was or not. Whether there was or not, it can make no difference." The act of 1887 requires the petition to be filed in the "State Court at the time, or any time before, the defendant is required

by the laws of the state, or the rule of the State Court in which the suit is brought, to answer or plead to the declaration or complaint—not at or before the expiration of the extended time within which parties may choose to stipulate for the filing of an answer or demurrer. The prior act allowed the petition to be filed at any time during the term at which it might be tried. But the Supreme Court repeatedly held that the act meant the term at which it could be first at issue, and be ready for trial, provided the parties filed their pleadings at the time appointed by law, whether the court or the parties were ready for trial or not. And it was also held that the prolongation of the time of joining issue by orders of the court, or a stipulation for time between the parties, could not extend the time for filing a petition for removal to the next term.

Car Co. vs. Speck, 113 U. S. 84, 5 Sup. Ct. Rep. 374.

Gregory vs. Hartley, 113 U. S. 746, 5 Sup. Ct. Rep. 743.

And this has often been the ruling in this court, as will be seen by consulting the reports of its decisions. Even the "Statute, as thus construed, was deemed by Congress to be too liberal, and in 1887 the act was amended so as to require the petition to be filed at or before the time when the law required the defendant to plead. This law must be construed in the same way as the former, as to the matter of extending the time to plead by the court, or by stipulation of the parties. The party must make his election and file his petition at or before the time when his pleading is first due under the law, or he waives his right to a removal. The petition in this case was not in time, and the case must be remanded on that ground, and it is so ordered."

In the case of Austin vs. Gagan, 39 Fed. Rep., 626, Judge Sawyer again holds that subsequent extension of time to answer

by special stipulation of the parties cannot extend the time for removal under the statute.

In the case of Delbanco vs. Singletary, 40 Fed. Rep., 177, Judge Sabin says: "We think it will be better for all parties concerned, will save time and expense to litigants, if it is clearly and distinctly understood that parties desiring to remove their cases from the State Courts must act promptly, and comply strictly with the provisions of the statute relative thereto: that courts have not the authority to, and will not by doubtful construction, enlarge, change or modify the clear terms of the statute. The statute is clear and simple as to the time when the petition and bond for removal must be filed, and parties must comply with it.

In Wedekind vs. Southern Pac. Co., supra, decided by this court, an inference may arise that possibly an order of the State Court extending defendant's time to plead might be construed as extending his time within which to file his petition and bond for removal of the cause. If such inference fairly ari es in that case we wish here to correct it, as under the authorities cited, it seems clear that such an order of the State Court could not have any such effect. The State Court could not, by order or otherwise, enlarge or modify the terms and provisions of an act of Congress, nor confer jurisdiction upon this court which otherwise it would not have."

The last reported case analogous to this is the case of Veelie vs. Manufacturers' Accident Indemnity Co., reported in 40 Fed. Rep., 545,in which all the authorities on this subject are reviewed. In this case, Judge Jenkins attempts to distinguish the Lockhart case from his own decisions and the unbroken current of authorities on the question of removal by saying that in Tennessee the time of pleading is fixed by rule of court.

But it is fixed by statute, and the reasoning of the learned judge is just as applicable to the case in Tennessee as to a case in Wisconsin.

See also 39 Fed. Rep., 289, 581, 625, 626, 629,
40 Fed. Rep., 177.

The reasoning of these authorities is in favor of a strict compliance with the letter and spirit of the act, and to make it as effectual as its terms would indicate in establishing an important rule of practice.

It is submitted that the jurisdiction of the State Court was exclusive after the time fixed for pleading had elapsed, and that nothing can result from the prosecution of the writ of error, but unreasonable delay to defendant in error.

The writ should be dismissed and the judgment affirmed.

LUKE E. WRIGHT,
GEO. GANTT,
For defendant in error.